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IN THE

Supreme Court of the United States

October Term, 1965

No. 1051

DISTRICT COUNCIL OF PAINTERS NO. 48, BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Nine Circuit.

Petitioner District Council of Painters No. 48 prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on January 5, 1965, and from the Court's Decree entered on February 11, 1965. Such judgment affirmed an Order of the National Labor Relations Board directing Petitioner to cease and desist from inducing or encouraging any individual employed by Avalon Painting and Drywall Company (Avalon) or Reuben Casey (Casey) to engage in a work stoppage with an object of compelling Avalon or Casey to cease using, handling or otherwise dealing in any product of, or to cease doing business with, Hamilton Materials, Inc.

Opinion Below.

The Opinion of the Court of Appeals below is not yet reported and is attached hereto as Appendix "A". The decree issued by the Court below is attached hereto as Appendix "B". The decision and order of the National Labor Relations Board is attached hereto as Appendix "C". The Intermediate Report and Recommended Order of the Trial Examiner is attached hereto as Appendix "D".

Jurisdiction.

The judgment of the Court of Appeals was entered on January 5, 1965, and the Decree on February 11, 1965.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

Question Presented.

Whether a statement by a union representative unaccompanied by any threats, coercion or restraint, to a top-ranking supervisor that material coming onto the premises is unfair falls within the prohibition of Section 8(b)(4)(i)(B) of the Act, or conversely whether such appeal for the support of an employer falls within the protective scope of the first amendment to the United States Constitution.

Statutes Involved.

The pertinent provisions of the Labor-Management Reporting and Disclosure Act of 1959 (73 Stat. 542-543, 29 U.S.C. (Supp. IV, 1963), Section 158(b)(4), are Sections 7 and 8(b)(4)(i)(B)):

> Section 7: "Employees shall have the right to self-organization, to form, join, or assist labor organi-

zations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ." Section 8(b)(4): "It shall be an unfair labor practice for a labor organization or its agents:

(i) To engage in, or to induce or encourage any individual employed by any person engaged in commerce . . .

To engage in, a strike or a refusal in the course of his employment, to use . . . or otherwise handle or work or any goods, articles, materials . . . where . . . an object thereof is

(B) Forcing or requiring any person to cease using, selling . . . or otherwise dealing in the products of any other producer . . . or to cease doing business with any other person . . ."

Statement.

A. The Facts.

Hamilton Materials, Inc. (herein called "Hamilton"), and Paint Makers Local Union 1232, were engaged in a inter-labor dispute, resulting in the local union picketing Hamilton's premises since December 19, 1962. Hamilton was engaged in delivering drywall and acoustical materials to job sites known as "Springdale South Homes" (Springdale) and "Weatherstone South" (Weatherstone) on or about December 20, and 22, 1962 respectively.

As regards Petitioner, District Council of Painters No. 48*, the facts in essence are as follows:

On December 20, 1962, Calmer H. Hansen, the representative of the Union, came on the Weatherstone project and spoke to one, R. C. Wooten, *a taping foreman* for Reuben Casey, a drywall contractor [Tr. p. 62]. Wooten also was a member of a painters local union affiliated with District Council of Painters No. 48 [Tr. p. 62]. Hansen at this time advised Wooten that Hamilton Materials which were being loaded on the job site were "unfair". The trial examiner found that Wooten then asked what he should do with the materials; that Hansen replied he did not know; that Wooten then instructed the driver to put the truck in a garage at the site, and stated the materials would be held until such time as a clearance was obtained; that Hansen then sought out the project superintendent and stated that the material arriving on the job was "unfair" and was being unloaded; that the superintendent said he "would check into it"; and that this terminated the conversation [Tr. p. 114]. This finding was affirmed by the Board and lower court (Appendices A, C and D).

On December 22, 1962, Hansen went onto the Springdale project and stated to Kenneth Cosiett, *a drywall*

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*Although both Paint Makers Local Union No. 1232 and District Council of Painters No. 48 were made Respondents throughout all of the proceedings below, the basis of liability is separate and distinct. This Petition is being filed solely on behalf of District Council of Painters No. 48. Accordingly, only those facts pertaining to it will be discussed herein.

foreman for Avalon Painting and Gravel Company, that the Hamilton materials being unloaded were "unfair" [Tr. p. 29]. Coslett although working directly in connection with the job superintendent, was also a member of a painters local union. When Coslett inquired as to whether picketing would occur if the Hamilton materials were not removed, Hansen replied that he did not know. No threats of picketing were ever uttered by Hansen, and he at no time attempted to approach employees at either of the two job sites in an effort to induce some form of work stoppage with respect to Hamilton Materials.

B. The Proceedings Below.

The trial examiner found that the statements of Hansen characterizing the materials as "unfair" were not violative of Section 8(b)(4), as they constituted in effect an attempt to persuade the foremen in each instance, to exercise their management prerogative of electing not to receive the materials, and as such constituted direct thrusts at the employer. The Board, however, distinguished from the decisions in *Denver Building and Construction Trades Council (The Grauman Company)*, 87 N.L.R.B. 755; *Spokane Building and Construction Trades Council (Kinsey Mfg. Co.)*, 89 N.L.R.B. 1168, and said in effect that whereas unfair listing is a traditional primary weapon aimed at the public at large, an "unfair" statement made directly to secondary union employees represents a direct thrust against such employees sufficient to invoke their obli-

gation under usual union rules not to handle "unfair" or "non-union material". The Board particularly stressed in this regard that Coslett and Wooten were members of Painters Local 1817, affiliated with the District Council of Painters No. 48 in addition to being supervisors.

The lower court, conceded that ". . . if the statements of the District Council No. 48 representatives that Hamilton Products were 'unfair', were directed at the foreman's discretionary authority alone, such statements would not be violative of Section 8(b)(4); they are not threats within the meaning of Sub-Section (ii). But if the statements were made with the intent to induce the foremen to withhold their services from their employer, a violation of Sub-Section (i) would be evident . . .". The Court concluded "The National Labor Relations Board determined that the statements that Hamilton Materials were 'unfair' were uttered with the express intent of inducing the foremen to withhold their services from their employers. The statements were thus inducements in violation of Section 8(b)(4)(i)(B). We hold this finding is supported by substantial evidence".

ARGUMENT.

I.

The Statement That Hamilton Materials Were Unfair, Absents Evidence of Threats, Constitutes a Pure Appeal to an Employer for Support of the Union's Cause and Is Not Within the Prohibitions of Section 8(b)(4) of the Act.

The language "any individual employed by any person" which appears in Section 8(b)(4)(i) of the Act taken literally could ensnare within its ambit an appeal by a union to the president of a corporation, if the latter is carried on the payroll, while immunizing the same statement if made to a sole proprietor or partner in an unincorporated association. Liability would, therefore, depend on the form of business the employer was engaged in, rather than the substance of the remark. This Court in *N.L.R.B. v. Servette Inc.*, 377 U.S. 46, resolved this dilemma by proscribing inducements to a supervisor if the latter was asked to engage in a work stoppage. Conversely inducements to supervisors were held lawful if the latter were asked to "exercise their delegated authority by making business judgment to cease dealing with the primary employer". This Court noted in particular that Section 8(b)(4)(ii)(B) made inducements to employers or their representatives unlawful only when such inducements were accompanied by threats, coercion or restraint. The Court concluded at page 49:

> "If Sub-Section (i), in addition to prohibiting inducement of employees to withhold employment

> services, also reaches an appeal that the managers exercise their delegated authority by making a business judgment to cease dealing with the primary employer, Sub-Section (ii) would be almost superfluous. Harmony between (i) and (ii) is best achieved by construing Sub-Section (i) to prohibit inducement of the managers to withhold their services from their employer, and Sub-Section (ii) to condemn an attempt to induce the exercise of discretion only if the inducement would 'threaten, coerce or restrain that exercise' ".

The lower court's conclusion that the Union's statements to the foremen were for the purpose of "inducing the foremen to withhold their services from their employers" is completely unsupported by substantial evidence.

> *Universal Camera Company v. N.L.R.B.*, 340 U.S. 474.

All of the evidence available to the Court and Board has been outlined above. Significantly, the Union agent, Hansen, at no time attempted to converse with rank and file employees on either of the two job sites in an effort to insure that a work stoppage would occur with respect to Hamilton Products. We submit that his appeal confined as it was to the top ranking supervisors on the job sites, constituted a pure and simple effort to enlist the cooperation of the employer. Accordingly, such statements did not fall within the ban of Section 8(b)(4)(i)(B).

II.

The Appeal by the Union Rendered to the Supervisors for Support in Its Trade Dispute Is Entitled to the Highest Protection Under the First Amendment Guarantee of Free Speech.

This Court has consistently protected the communication element in picketing while upholding federal and state restrictions on activities which transcend speech. As stated in *Teamsters Union v. Hanke,* 339 U.S. 470, at page 474:

> ". . . We must start with the fact that while picketing has an ingredient of communication, it cannot dogmatically be equated with the constitutionally protected freedom of speech. Our decisions reflect recognition that picketing is indeed a hybrid . . .".

Other decisions of this Court carefully distinguish between the communication and other aspects involved in picketing activities. *Thornhill v. Alabama,* 310 U.S. 88; *Building Service Union v. Gazzam,* 339 U.S. 532; *Hughes v. Superior Court,* 339 U.S. 460; *Teamsters Local v. Vogt, Inc.,* 354 U.S. 284, 77 S. Ct. 1166.

In *N.L.R.B. v. Fruit Packers,* 377 U.S. 58, this Court again expressing its concern that the communication aspects of picketing not be curtailed, refused to find that picketing at customer entrances to markets urging the non-purchase of certain unfair items constituted intimidation, coercion or restraint. As the Court states at page 61:

> "We have recognized this congressional practice and have not ascribed to congress a purpose to outlaw peaceful picketing unless there is the clear-

> est indication in the legislative history that congress intended to do so as regards the particular ends of the picketing under review. *Both the congressional policy and our adherence to this principle of interpretation reflect concern that a broad ban against peaceful picketing might collide with the guarantees of the First Amendment.*" (emphasis added.)

In *New York Times Co. v. Sullivan,* 376 U.S. 254, 264, 84 S. Ct. 710, this Court characterized the First Amendment guarantee as an attempt to secure "the widest possible dissemination of information from diverse and antagonistic sources". Again at page 269: This Court stated:

> "The constitutional safeguard, we have said, was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people".

Also appropriate is the still vital language of this Court in *Thornhill v. Alabama,* 310 U.S. 88, at page 93:

> "In the circumstances of our times, the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution."

The instant case involves a classic example of communication by a union to a top-ranking management representative on a construction job site, in an effort to enlist his support in the hope that he might exercise a management discretion to refuse to permit the

materials in question from being processed. The present situation, not involving picketing, but confined solely to persuasion, dramatically illustrates the Board's attempt to extend the scope of Section 8(b)(4)(i)(B) so as to infringe upon the protective constitutional guarantee of free speech. If the lower Court's decision is permitted to stand, we submit that the traditional right of labor organizations to enlist support on their side of a trade dispute will have been virtually destroyed.

Conclusion.

From what has been said above, it is clear that not only is an important question of federal law presented in this Petition for Review, but that the Court below has decided a federal question of substance erroneously and in conflict with applicable decisions of this Court. It would appear that review by this Court is warranted and necessary.

It is respectfully submitted, that for the reasons asserted above, this Petition for a Writ of Certiorari should be granted.

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APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

National Labor Relations Board, Petitioner, vs. District Council of Painters #48 and Paint Makers Local Union #1232, Respondents. No. 19,263.

[January 5, 1965]

On Petition for Enforcement of an Order of the National Labor Relations Board

Before: Barnes, Duniway and Ely, Circuit Judges

Barnes, Circuit Judge:

This is a petition by the National Labor Relations Board for enforcement of its order, pursuant to Section 10(e) of the National Labor Relations Act, as amended (29 U.S.C. § 151, *et seq.*). The Board possessed jurisdiction over respondents' activities because of the substantial interstate commerce that was affected. 29 U.S.C. §§ 152(6,7), 160(a).

In the proceeding below, the National Labor Relations Board found that Local 1232 violated Section 8(b)(4(i) and (ii)(B) of the Act by encouraging an individual employed by Avalon Painting & Drywall Co. ("Avalon") to refuse in the course of his employment to use, handle, or otherwise perform services with materials manufactured by Hamilton Materials, Inc. ("Hamilton"), and by threatening, coercing and restraining Avalon, all with an object of forcing or requiring Avalon to cease doing business with Hamilton. The Board also found that the District Council of Paint-

ers #48 violated Section 8(b)(4)(i)(B) of the Act by encouraging individuals employed by Avalon and Reuben Casey ("Casey") to refuse in the course of their employment to use, handle, or otherwise perform services with Hamilton material, with an object of forcing or requiring Avalon and Casey to cease doing business with Hamilton. The Board's order requires that both respondents cease and desist from the unfair labor practices found, post the customary notices at their business offices and union halls and mail signed copies to the Board for posting at Avalon and Casey, if the employers "so agree."

Since December 19, 1962, Local 1232 had had a labor dispute with Hamilton, the primary employer. During the same time period, Local 1232 has not been engaged in a labor dispute with Avalon or Casey, the secondary employers. The Board found that in the course of its labor dispute with Hamilton, Local 1232 engaged in a proscribed secondary boycott of Avalon. The Board also found that, in assisting Local 1232 in its dispute, unaffiliated District 48 engaged in a secondary boycott of Avalon and Casey.

The alleged violations with respect to Avalon occurred at a construction site known as Springdale South Homes, where Avalon employees were working under the supervision of "drywall foreman" Kenneth L. Coslett. On December 20, 1962, a business agent of Local 1232, one Johnie Thomas, approached Coslett while Hamilton materials were being unloaded at the construction site. Thomas introduced himself to Coslett as a representative of Local 1232, and told Coslett that Avalon "wouldn't be able to unload the material . . ., that it was unfair material, and [that] if we [Avalon]

did unload the material . . . and used it . . . they [Local 1232] would put up a picket line and we [Avalon] wouldn't be able to enter the job." The materials were nevertheless unloaded and used in the project and no picketing took place.

District Council 48, in support of Local 1232, sent two business representatives to the Springdale project about two days after Thomas' visit. Addressing Coslett and Avalon's project superintendent, Forrest Windell, one of the representatives, Calmer Hanson, said that the "material arriving on the job was unfair." Windell inquired whether the District Council was going to picket the project, and Hanson replied that he did not know. With that, the two representatives left the construction site.

On another occasion, on or about December 20, 1962, Hanson approached a "taping foreman," R. C. Wooten, at a construction site known as Weatherstone North, where employees of Casey were engaged in a project. Hanson told Wooten that the materials were "unfair" but, in resolving a dispute in the testimony, the Hearing Examiner determined that no threats of picketing were uttered by the union representatives.

Another incident occurred in January 1963 at a construction project known as Sunkist Ranchos, where Avalon personnel were then working. During the discussion of the unloading of Hamilton materials, Johnie Thomas came up to an Avalon foreman named Giambra and gave him two circulars, indicating that the picketing was solely of a primary nature against Hamilton employees, and told Giambra he would picket if the truck were unloaded. The driver proceeded to unload the truck, and while he was so engaged, Thomas stationed him-

self at a location on a street about a block from the unloading site and engaged in picketing. Upon completion of the unloading, the truck driver drove off, and Thomas then discontinued the picketing and followed the truck in his car.

The Hearing Examiner determined that the only proscribed activities were the Section 8(b)(4)(i) and (ii)-(B) violations committed by Johnie Thomas on behalf of Local 1232 at the Springdale site. The Board affirmed the findings of Local 1232 violations, but also found that District 48 had violated Section 8(b)(4)(i)-(B) by its statements by Calmer Hanson at the Springdale and Weatherstone sites that the Hamilton materials were "unfair." Neither the Hearing Examiner nor the Board found the actions at Sunkist Ranchos in violation of the Act; each found that the activities there were purely primary in character and that Thomas so informed the foreman.

The Board's petition seeks to enforce its order regarding the alleged violations of Section 8(b)(4) committed at the Springdale and Weatherstone sites. Respondents challenge the petition principally on three distinct grounds:

(1) There is no substantial evidence on the record to support the findings of the Board of Section 8(b)-(4) violations:

(2) The activities at the construction sites were registered against the primary employer and could not, therefore, be considered secondary boycotts.

(3) The alleged statements made by the union representatives were in any event not violative of Section 8(b)(4) because they were made to foremen in supervisory capacities, not employees.

I.

The factual findings of the Board are amply supported by substantial evidence on the record. Corroborative of this conclusion is the fact that the Hearing Examiner and Board agreed completely on the factual findings; the Board's modification of the Hearing Examiner's decision was based only on the legal significance to be attached to a statement that Hamilton's materials were "unfair." The evidence in the record supports the factual findings agreed upon by the Hearing Examiner and the Board. Respondents' contention of a lack of substantial evidence is not well taken.

II.

The remaining legal errors asserted by respondents refer to the proper construction of Section 8(b)(4). That Section, as amended by the Labor-Management Reporting and Disclosure Act of 1959, provides in part that it shall be an unfair labor practice for a labor organization or its agents:

> "(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or
>
> (ii) to threaten, coerce, or restrain any person engaged in commerce or in any industry affecting commerce, where in either case an objective thereof is:
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise

dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of Section 9; Provided, That nothing contained in this clause (B) shall be construed to make unlawful where not otherwise unlawful, any primary strike or primary picketing; . . . Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution."

This statutory provision is clearly aimed at curbing the practice commonly known as the secondary boycott whose "sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it." *International Bhd. of Elec. Workers v. NLRB,* 181 F.2d 34, 37 (2d Cir. 1950), af-

firmed 341 U.S. 694 (1951). The activities found to have taken place by the Hearing Examiner and Board are clearly not of a type directed solely against the primary employer. The clearest demonstration of the secondary nature of the proscribed activities is to compare them to the union's activities at the Sunkist Ranchos project. At Sunkist it was made clear that the threats were made *to picket activities of Hamilton at the site* rather than those *of any secondary employer.* The circulars given to Giambra by Thomas clearly informed the foreman that the picketing activities were aimed against Hamilton employees and would only be carried on while such employees were at the site. The driver of the Hamilton truck was undeniably the object of Thomas' picketing, not the secondary employer. The contrast between what transpired at Sunkist Ranchos and what transpired at Springdale and Weatherstone is striking. At the latter two sites, union representatives sought to induce and encourage the foreman in charge of work in progress to stop construction activities as proscribed by Section 8(b)(4)(i)(B) of the Act. And at Springdale, Thomas even threatened the Avalon foreman, Kenneth Coslett, that if the material was unloaded, Local 1232 "would put up a picket line" and Avalon's men "wouldn't be able to enter the job." Such threats to third parties are clearly proscribed by Section 8(b)(4)(ii)(B). Respondents cannot sustain a contention that such inducements and threats are essentially a *primary* boycott. Their conduct as well as their words clearly betray them.

Having accepted as true that Thomas told Coslett that if Avalon handled Hamilton materials, pickets would be set up and Avalon employees might be kept

off the job, it became almost surplusage to state that such conduct constituted a threat against Avalon within the meaning of Section 8(b)(4)(ii)(B). We hold that such declarations by a union representative are clearly within the terms of the statutory prohibition. It also is clear that Thomas' conduct at Springdale constituted the inducement and encouragement of the proscribed acts of Section 8(b)(4)(i)(B).

The Hearing Examiner and Board did disagree as to whether the District 48 representative's statements at Springdale and Weatherstone that Hamilton's material was "unfair" constituted an inducement or encouragement under Section 8(b)(4)(i)(B). We agree with the Board that such statements did constitute an inducement or encouragement. The statement made was clear in its meaning and implications. It falls within the construction of this statutory provision set out by the Supreme Court in *International Bhd. of Elec. Workers v. NLRB,* 341 U.S. 694 (1951). In that case, the Court said:

> "The words 'induce or encourage' are broad enough to include in them every form of influence and persuasion." *Id.* at 701-02.

III.

Respondents also contend that, given the findings of the Board, no violation of Section 8(b)(4) can be found because the individuals approached by the union representatives were not employees of a secondary employer, but rather supervisors whom the union could legitimately approach. This argument flies in the face of both the statute's language and intent. This is clearly pointed out by Judge Medina in *NLRB v. Local 294,*

International Bhd. of Teamsters, 298 F.2d 105 (2d Cir. 1961), where he held that even if foremen are to be considered supervisors, Section 8(b)(4)(i)(B) applies to supervisors. The words "employees of any employer" were deleted from the Act in 1959 and were replaced by "any individual employed by any person." A supervisor, as defined in Section 2(11) read together with Section 2(3) of the Act, was not an "employee" within Section 8(b)(4) before the 1959 amendments. Pursuant to the 1959 amendments, however, a supervisor may now be "any individual employed by any person engaged in commerce or in an industry affecting commerce," as the Act now reads. But at the same time this expansion of the statutory language was effected, Section 8(b)(4) was reconstructed into two distinct subdivisions. This new bipartite construction of Section 8(b)(4) is interrelated to the statutory change which clearly indicated the provision's applicability to those in a supervisory capacity. This interrelationship was discussed by the Supreme Court in the recent case of *N.L.R.B. v. Servette, Inc.,* 377 U.S. 46 (1964). There, Mr. Justice Brennan carefully noted that Section 8(b)(4)(i)(B) now applies to managers as well as employees of secondary employers, and proscribes any inducements or encouragements of these individuals "to withhold their services from their employer." *Id.* at 54. Subsection (ii), on the other hand, treats the manager and supervisor in his discretionary capacity. This subsection condemns any attempt to induce the exercise of discretion if the inducement would "threaten, coerce, or restrain" that exercise. *Ibid.* Thus, if the statements of the District Council #48 representatives that Hamilton products

were "unfair" were directed at the foreman's discretionary authority alone, such statements would not be violative of Section 8(b)(4); they are not threats within the meaning of subsection (ii). But if the statements were made with the intent to induce the foremen to withhold their services from their employer, a violation of subsection (i) would be evident; foremen are now clearly encompassed within subsection (i) by virtue of the 1959 amendments. The National Labor Relations Board determined that the statements that Hamilton materials were "unfair" were uttered with the express intent of inducing the foremen to withhold their services from their employers.[1] The statements were thus inducements in violation of Section 8(b)(4)(i)(B). We hold this finding is supported by substantial evidence.

Finding no error, we order the Board's petition to enforce its order of November 13, 1963, be granted.

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[1]Respresentatives of District Council #48 approached both Coslett, who was a foreman and a union member, and Windell, who was project superintendent. The Board's determination relates to Coslett, and as we have indicated, is supported by the evidence. The Board did not consider the statement to Windell in this connection, and we therefore express no opinion about it.

APPENDIX B.

Decree.

United States Court of Appeals, for the Ninth Circuit.

National Labor Relations Board, Petitioner, v. District Council of Painters #48 and Paintmakers Local Union #1232, Respondents. No. 19,263.

Before: Barnes, Duniway and Ely, Circuit Judges:

This Cause came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondents, their officers, representatives, successors, assigns and agents on November 13, 1963, and considered the briefs and transcript of record filed in this cause. On January 5, 1965, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order. In conformity therewith, it is hereby,

Ordered, Adjudged and Decreed by the United States Court of Appeals for the Ninth Circuit that:

I. District Council of Painters #48, its officers, agents, representatives, successors, and assigns, shall:

1. Cease and desist from:

(a) Engaging in, or inducing or encouraging any individual employed by Avalon Painting & Drywall Co., or Reuben Casey, to engage in a strike or a refusal in the course of such individual's employment to use or handle any materials, or to perform any services, with an object of forcing or requiring Avalon Painting & Drywall Co., or Reuben Casey, to cease using, handling or otherwise dealing in any product of, or to cease doing business with, Hamilton Materials, Inc.

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

(a) Post at its business offices and meeting halls, copies of the notice attached hereto marked "Appendix B." Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region, Los Angeles California, shall, after being signed by a duly authorized representative of the said District Council #48, be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to its members are customarily posted. Reasonable steps shall be taken by the said District Council #48 to insure that said notices are not altered, defaced, or covered by any other material.

(b) Forthwith mail copies of the said notice to the said Regional Director, after such copies have been signed as provided above, for posting by Avalon Painting & Drywall Co., and Reuben Casey, if they so agree, at places where they customarily post notices to individuals in their employ.

(c) Notify said Regional Director, in writing, within 10 days from the date of this Decree, what steps District Council #48 has taken to comply herewith.

II. Paint Makers Local Union #1232, its officers, representatives, successors, assigns and agents, shall:

1. Cease and desist from:

(a) Engaging in, or inducing or encouraging any individual employed by Avalon Painting & Drywall Co.

to engage in, a strike or a refusal in the course of such individual's employment to use or handle any materials, or to perform any services, with an object of forcing or requiring Avalon Painting & Drywall Co. to cease using, handling or otherwise dealing in any products of, or to cease doing business with, Hamilton Materials, Inc.;

(b) Threatening, coercing or restraining Avalon Painting & Drywall Co. for such an object.

2. Take the Following affirmative action which the Board has found will effectuate the policies of the Act:

(a) Post in conspicuous places at its headquarters and usual membership meeting place, including all places where notices to its members are customarily posted, copies of the notice attached hereto and marked "Appendix A." Copies of said notice to be furnished by the Regional Director for the Twenty-first Region, Los Angeles, California, shall, after being signed by a duly authorized representative of the said Local 1232, be posted by it immediately upon receipt thereof and maintained by it for 60 days thereafter in such conspicuous places. Reasonable steps shall be taken by the said Local 1232 to insure that said notices are not altered, defaced, or covered by any other material;

(b) Forthwith mail copies of the said notice to the said Regional Director, after such copies have been signed as provided above, for posting by Avalon Painting & Drywall Co., if it so agrees, at places where it customarily posts notices to individuals in its employ;

(c) Notify the said Regional Director, in writing, within 10 days from the date of this Decree what steps the Respondent, Paint Makers Local Union #1232, has taken to comply therewith.

Endorsed, Decree Filed and Entered Feb. 11, 1965.
/s/ Frank H. Schmid
Frank H. Schmid
Clerk

A True Copy, Feb. 19, 1965

Attest:
(Seal)
Frank H. Schmid
Clerk

APPENDIX A

Notice to All Members of Paint Makers Local Union #1232 and Individuals Employed by Avalon Painting & Drywall Co.

Pursuant to

A DECREE of the United States Court of Appeals enforcing an Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our members and the said employees that:

> WE WILL NOT engage in, or induce or encourage any individual employed by AVALON PAINTING & DRYWALL CO. to engage in a strike or a refusal in the course of such individual's employment to use or handle any materials, or to perform any services, with an object of forcing or requiring AVALON PAINTING & DRYWALL CO. to cease using, handling, or otherwise dealing in any products of, or to cease doing business with, HAMILTON MATERIALS, INC.; or to threaten, coerce or restrain AVALON PAINTING & DRYWALL CO. for such an object.

Paint Makers Local Union #1232
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date of such posting and must not be altered, defaced, or covered by any other material.

Information regarding provisions of this notice and compliance with its terms may be secured from the Regional Office of the National Labor Relations Board, 849 So. Broadway, Los Angeles 14, California. (Telephone No: RIchmond 9-4711, Extension 1031.)

APPENDIX B

Notice to All Members of District Council of Painters #48 and Individuals Employed by Avalon Painting & Drywall Co., and Reuben Casey

Pursuant to

A DECREE of the United States Court of Appeals enforcing an Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our members and the said employees that:

> WE WILL NOT engage in, or induce or encourage any individual employed by AVALON PAINTING & DRYWALL CO., or REUBEN CASEY, to engage in a strike or a refusal in the course of such individual's employment to use or handle any materials, or to perform any services, with an object of forcing or requiring AVALON PAINTING & DRYWALL CO., or REUBEN CASEY, to cease using, handling, or otherwise dealing in any products of, or to cease doing business with, HAMITLON MATERIALS, INC.

District Council of Painters #48
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of such posting and must not be altered, defaced, or covered by any other material.

Information regarding provisions of this notice and compliance with its terms may be secured from the Regional Office of the National Labor Relations Board, 849 S. Broadway, Los Angeles 14, California. 90014, (Telephone No: RIchmond 9-4711, Extension 1031.)

APPENDIX C.

Decision and Order.

United States of America, Before the National Labor Relations Board.

District Council of Painters #48 and Paint Makers Local Union #1232 (Hamilton Materials, Inc.) and Golding & Jones, Inc. Case No. 21-CC-568.

On July 17, 1963, Trial Examiner Herman Marx issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent Local had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the Intermediate Report attached hereto. He also found that the Respondent Local and the Respondent District Council had not engaged in certain other alleged unfair labor practices and recommended dismissal of these allegations of the complaint. Thereafter, the Respondent Local and the General Counsel filed exceptions to the Intermediate Report and supporting briefs.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report and the entire record in this case, including the exceptions and briefs,[1] and hereby adopts the find-

[1]As the record, exceptions, and briefs in our opinion adequately present the issues and the positions of the parties, the Respondent Local's request for oral argument is hereby denied.

ings, conclusions, and recommendations of the Trial Examiner, except as noted below.

1. As found by the Trial Examiner, about December 20, 1962, Respondent Local's business agent Thomas stated to secondary employer Avalon's drywall foreman Coslett at the Springdale construction project, that primary employer Hamilton's material was "unfair" and if Avalon unloaded and used Hamilton's material Respondent Local "would put up a picket line" and Avalon personnel "wouldn't be able to enter the job." We find, in agreement with the Trial Examiner, that by such statement Respondent Local violated Section 8(b)(4)(i) and (ii)(B) of the Act.

2. As found by the Trial Examiner, about 2 days after Thomas' visit to the Springdale project, Respondent District Council business agent Hanson went to that project and also stated to Coslett and Avalon's project superintendent, Windell, that the Hamilton material arriving on the job was "unfair," but when Windell asked whether the District Council would picket the project Hanson replied that he did not know. As further found by the Trial Examiner, Hanson at about the same time followed a Hamilton truck to the Weatherstone construction project, and there stated similarly to secondary employer Casey's taping foreman, Wooten, that Hamilton material was "unfair."[2]

We agree with the Trial Examiner's concluding finding that there was no implied threat in Hanson's state-

[2]For the reasons stated by the Trial Examiner, we agree with his discrediting of Wooten's testimony that Hanson also told Wooten that the District Council "could put up a picket on the job." In any event, we are not convinced that a clear preponderance of all the relevant evidence warrants a reversal of the Trial Examiner's credibility resolution in this connection See *Standard Dry Wall Products,* 91 NLRB 544, enfd. 188 F. 2d 362 (C.A.3).

ment to Windell that he did not know whether the Springdale project would be picketed, and therefore that there was no violation by the District Council of Section 8(b)(4)(ii)(B). We disagree, however, with his concluding finding that Hanson's "unfair" statements were not unlawful. In so finding, the Trial Examiner relied on the *Grauman* and *Kimsey* cases, where the Board held that an "unfair listing" of a primary employer is not a *per se* violation of Section 8(b)(4),[3] and he equated the "unfair" statements in the instant case with such an "unfair listing." However, in the very cases relied upon, and in subsequent cases, the Board repeatedly has held that, statements made *directly* to secondary union employees that a primary employer is "unfair" (or the equivalent non-union"), constitute unlawful "inducement" and "encuragement" under Section 8(b)(4).[4] The distinction thus drawn is, of course that an "unfair listing" is a traditional primary weapon aimed at the public at large which represents a direct thrust against the primary employer, while an "unfair" statement made directly to secondary union employees represents a direct thrust against such employees sufficient to invoke their obligation under usual union rules not to handle "unfair" or "non-union" material. The record shows that Coslett and Wooten are members of Painters Local 1817 affiliated with Respondent. We find

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[3]*Denver Building and Construction Trades Council (The Grauman Co.)*, 87 NLRB 755, 756-7. *Spokane Building and Construction Trades Council (Kimsey Mfg. Co.)*, 89 NLRB 1168, 1169.

[4]*Grauman, supra*, at 759; *Kimsey, supra*, at 1170-1172; Local 1016, *United Brotherhood of Carpenters & Joiners of America, AFL-CIO, et al. (Booker Lumber Co. Inc.)*, 117 NLRB 1739, 1744, 1745; *United Brotherhood of Carpenters & Joiners of America, AFL-CIO, et al. (Del-Mar Cabinet Company, Inc.)*, 121 NLRB 1117.

that Hanson's statements to these "individuals"[5] that Hamilton was "unfair" constituted, under the circumstances of this case, direct requests not to handle Hamilton materials. Respondent District Council, accordingly, violated Section 8(b)(4)(1)(B) of the Act.

3. As found by the Trial Examiner, in January 1963, Respondent Local's business agent Thomas appeared at the Sunkist Ranchos construction project at the same time as a truck bearing materials from primary employer Hamilton arrived for delivery to secondary employer Avalon; and Thomas gave Avalon foreman Giambra two explanatory circulars, and then told Giambra that he would picket if the truck were unloaded, both of which events occurred.[6] For the reasons fully explicated by the Trial Examiner, we agree with his concluding finding that Thomas' threat to picket, when considered in the entire context of the explanatory circulars and the other conduct of Thomas which took place, constituted a threat only to lawfully picket Hamilton's driver while he unloaded the truck, and therefore was not violative of Section 8(b)(4).[7]

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[5]The Trial Examiner found, and we agree, that Coslett is an "individual employed by any person" as that phrase is used in Section 8(b)(4)(i). For similar reasons, and as Wooten appears to occupy a similar minor supervisory status, we also find that Wooten is such an "individual."

[6]One circular stated that the threatened picketing was "designed solely and exclusively to solicit the cooperation of employees" of Hamilton and would "only take place when Hamilton . . . employees are on the job"; the other stated that such picketing was only "to advertise the facts of the dispute to [Hamilton] employees," and that such dispute was "only with Hamilton" and not with any other employer or person on the jobsite.

[7]See *General Drivers, Chauffeurs, and Helpers, Local Union No. 886. (The Stephens Company)*, 133 NLRB 1393, 1395, 1396; *Plumbers & Pipefitters Local No. 471, etc. (Wycoff Plumbing)*, 135 NLRB 329, 331, 332. At the hearing, the General Counsel

Revised conclusion of law

3. By encouraging individuals employed by Avalon and Casey to refuse, in the course of their employment, to use, handle, or otherwise perform services with Hamilton materials, with an object of forcing or requiring Avalon and Casey to cease using, handling, or otherwise dealing in any products of, and to cease doing business with, Hamilton, District Council of Painters #48 has engaged in unfair labor practices within the meaning of Section 8(b)(4)(i)(B) of the Act.

ORDER

The Board adopts the Trial Examiner's Recommended Order as its Order,[8] with the following addition:

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expressly stated that he was alleging only the threat to picket, and not the picketing itself, as a violation of Section 8(b)(4).

Member Leedom would, however, find unlawful Thomas' threat to Giambra, Avalon's foreman, that if Hamilton's driver unloaded Hamilton's truck, he "would picket the place." Measured against the background of the earlier threat to "put up a picket line" made to Coslett at the Springdale project, which is found to be violative of 8(b)(4)(i) and (ii)(B), this threat takes on additional significance. Further, the picketing which followed Giambra's noncommittal answer seems to preclude any finding that Thomas envisaged only picketing in accordance with the principles laid down in the *Moore Dry Dock* case, 92 NLRB 547. Thus, when Giambra replied that "he didn't know anything about that," Thomas, instead of picketing in the vicinity of the Hamilton truck, picked a place one block from the loading site. In these circumstances, contrary to my colleagues, I see no warrant for according any mitigating effect to the explanatory circulars given to Giambra by Thomas and to Thomas' other conduct. Thomas' Affirmative act of picketing spoke louder than the circulars and his other conduct. Accordingly, as Foreman Giambra appears, like Coslett, to be an employee employed by a person in the statutory sense, I would find that Thomas' threat to Giambra was, like the threat to Coslett, also violative of Section 8(b)(4)(i) and (ii)(B).

[8]The Recommended Order is hereby amended by substituting for the first paragraph therein, the following paragraph:

> Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Board hereby orders that Respondent, its officers, agents, representatives, successors, and assigns, shall:

District Council of Painters #48, its officers, agents, representatives, successors, and assigns, shall:

1. Cease and desist from:

(a) Engaging in, or inducing or encouraging any individual employed by Avalon Painting & Drywall Co., or Reuben Casey, to engage in a strike or a refusal in the course of such individual's employment to use or handle any materials, or to perform any services, with an object of forcing or requiring Avalon Painting & Drywall Co., or Reuben Casey, to cease using, handling or otherwise dealing in any product of, or to cease doing business with, Hamilton Materials, Inc.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Post at its business offices and meeting halls, copies of the notice attached hereto marked "Appendix B." Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region, shall, after being signed by a duly authorized representative of the said District Council #48, be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to its members are customarily posted. Reasonable steps shall be taken by the said District Council #48 to insure that said notices are not altered, defaced, or covered by any other material.[9]

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[9]In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

(b) Forthwith mail copies of the said notice to the said Regional Director at the Regional Office of the National Labor Relations Board in Los Angeles, California, after such copies have been signed as provided above, for posting by Avalon Painting & Drywall Co., and Reuben Casey, if they so agree, at places where they customarily post notices to individuals in their employ.

(c) Notify the said Regional Director for the Twenty-first Region, in writing, within 10 days from the date of this Order, what steps District Council #48 has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges unfair labor practices not herein found by the Board.

Dated, Washington, D. C. Nov. 13, 1963.

Boyd Leedom, Member
John H. Fanning, Member
Gerald A. Brown, Member
National Labor Relations Board

(Seal)

APPENDIX B

Notice to All Members of District Council of Painters #48 and Individuals Employed by Avalon Painting & Drywall Co., and Reuben Casey

Pursuant to
A Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our members and the said employees that:

> WE WILL NOT engage in, or induce or encourage any individual employed by AVALON PAINTING & DRYWALL CO., or REUBEN CASEY, to engage in a strike or a refusal in the course of such individual's employment to use or handle any materials, or to perform any services, with an object of forcing or requiring AVALON PAINTING & DRYWALL CO., or REUBEN CASEY, to cease using, handling, or otherwise dealing in any products of, or to cease doing business with, HAMILTON MATERIALS, INC.

District Council of Painters #48
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Information regarding provisions of this notice and compliance with its terms may be secured from the Regional Office of the National Labor Relations Board, 849 So. Broadway, Los Angeles 14, California 90014, (Telephone No: RIchmond 9-4711, Extension 1031.)

IR-(SF)-23-63

Los Angeles, Calif.

United States of America, Before the National Labor Relations Board, Division of Trial Examiners, Branch Office. San Francisco, California.

District Council of Painters #48 and Paint Makers Local Union #1232 (Hamilton Materials, Inc.) and Golding & Jones, Inc. Case No. 21-CC-568.

ERRATA

Because of inadvertent typographical errors, the following corrections are made in the Intermediate Report in the above proceeding:

At page 4, line 40, delete "vaccum" and substitute for it the word "vacuum."

At page 8, line 57, delete "minimus" and substitute for it the word "minimis."

Dated: July 18, 1963.

/s/Herman Marx
Trial Examiner

APPENDIX D.

Intermediate Report and Recommended Order.

United States of America, Before the National Labor Relations Board, Division of Trial Examiners, Branch Office, San Francisco, California.

District Council of Painters #48 and Paint Makers Local Union #1232 (Hamilton Materials, Inc.) and Golding & Jones, Inc. Case No. 21-CC-568.

Clifford R. Hardy, Esq., of Los Angeles, Calif., for the General Counsel.

Lionel Richman, Esq., of Los Angeles, Calif., for the District Council.

Alexander H. Schullman, Esq., of Los Angeles, Calif., for Local #1232.

Mr. Norman E. Jones, of Los Angeles, Calif., for the Charging Party.

Before: *Herman Marx,* Trial Examiner.

Statement of the Case

The complaint alleges that the Respondents, District Council of Painters #48 and Paint Makers Local Union #1232 (respectively referred to herein as the District Council and Local 1232), have violated Section 8(b)-(4)(i) and (ii)(B) of the National Labor Relations Act, as amended (29 U.S.C. 151 *et seq.*; herein also called the Act.)[1]

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[1]Section 8(b) of the Act provides, in material part:

It shall be an unfair labor practice for a labor organization or its agents —

* * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a

Each Respondent has filed an answer which, in material substance, denies the commission of the unfair labor practices imputed to it in the complaint.[2]

Pursuant to notice duly served by the General Counsel of the National Labor Relations Board upon each Respondent and the Charging Party, a hearing has been held upon the issues in this proceeding before me, as duly designated Trial Examiner, at Los Angeles, California. All parties appeared and were afforded a full opportunity to be heard, examine and cross-examine witnesses, adduce evidence, file briefs, and submit oral argument. I have read and considered the respective briefs of the General Counsel and Respondents filed with me since the close of the hearing. The Charging Party has not filed a brief.[3]

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refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in an industry affecting commerce, where in either case an object thereof is:

* * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picking.

[2]The complaint was issued on March 11, 1963 and is based upon a charge filed with the Board on January 8, 1963. Copies of the complaint and charge have been duly served on each Respondent.

[3]The record reflects some confusion in connection with an appearance entered by Norman Jones, who is neither a member of the bar nor a party, but testified that he is a "management

Upon the entire record, and from my observation of the witnesses, I make the following findings of fact:

Findings of Fact

I. Jurisdiction

Hamilton Materials, Inc. (called Hamilton herein) is a California corporation; maintains its principal office and a manufacturing plant in Santa Ana, California; is there engaged in the business of manufacturing and selling drywall and acoustical materials used in the building and construction industry; and is, and has been at all times material to the issues, an employer within the meaning of Section 2(2) of the Act.

As the record establishes, without dispute, Hamilton and Paint Makers Local Union #1232 have been engaged in a labor dispute, and the latter has picketed Hamilton's business premises since December 19, 1962. The complaint alleges that the unlawful acts imputed there to the Respondents "were in furtherance and support of Respondent Local 1232's dispute with Hamilton."

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consultant." In entering his appearance, he described himself as "Norman Jones of Jones & Jones, Inc., appearing on behalf of the Charging Party, Hamilton Materials, Inc." No interest of "Jones & Jones, Inc." appears; and the Charging Party is not Hamilton Materials, Inc. but an enterprise named Golding & Jones, Inc., through which Norman Jones apparently does business as a management consultant, and whose interest here (not explicated, but as one may guess) appears to be that of management consultant to Hamilton Materials, Inc. As the Board's rules of practice do not prohibit corporations and persons not licensed to practice law from appearing in its proceedings as counsel for others, it may be that the reference to Jones & Jones, Inc., was intended as an appearance by it. Perhaps the reference was an inadvertent substitution for the name Golding & Jones, Inc. One can only guess. Be that as it may, as Golding & Jones, Inc., and not Hamilton Materials, Inc., is the Charging Party, I construe the appearance of Norman Jones as one for Golding & Jones, Inc.

During the calendar year 1962, in the course and conduct of its business, Hamilton sold to customers located outside California, and shipped from its place of business in that state to points in other states, materials valued in excess of $100,000. By reason of these transactions, Hamilton has been, at all times material to the issues, engaged in interstate commerce, and operations affecting such commerce, within the meaning of Sections 2(6) and 2(7) of the Act. Accordingly, the Board has jurisdiction of the subject matter of this proceeding. The assertion of jurisdiction will effectuate the policies of the Act.[4]

II. The labor organizations involved

As the complaint alleges, and the answers admit, the District Council and Local 1232 are, and have been at all material times, labor organizations within the meaning of Section 2(5) of the Act.

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[4] *Siemons Mailing Service*, 122 NLRB 81. I find no merit in a claim by the District Council to the effect that since the gravamen of the complaint is that the Respondents engaged in secondary boycott activities, the Board may not assert jurisdiction of the subject matter in the absence of proof that the secondary employers were engaged in interstate commerce or activities affecting it. *Ada Transit Mix*, 788, 790, and cases cited. I note, too, that the Board's jurisdiction is unaffected by evidence that Hamilton has made no interstate sales to specified customers since about May 1962 (whether Hamilton has had interstate dealings with other customers since then does not appear); and that since the formation of a corporate affiliate (Hamilton Distributing Company) in or about that month Hamilton "sells its products" (whether all of them does not clearly appear) to its affiliate. Hamilton's interstate transactions during the last calender year preceding the hearing are sufficient basis for the assertion of jurisdiction. *Aroostook Federation of Farmers, Inc.*, 114 NLRB 538, 539, *Langlade Veneer Products Corporation*, 118 NLRB 985, 986.

III. The alleged unfair labor practices

A. *Prefatory findings*

Basically, the General Counsel claims that the District Council and Local 1232, in furtherance of the latter's position in its dispute with Hamilton, induced or encouraged individuals employed by neutral (or so-called secondary) employers at construction projects not to accept, use or handle materials provided by Hamilton; and made threats to such employers that the projects where they were engaged would be picketed if the materials were accepted, used or handled. As support for his contentions, the General Counsel relies upon evidence of four incidents, details of which will presently appear.

The secondary employers involved are Avalon Painting & Drywall Co. (also called Avalon herein) and Reuben Casey. At all material times in this proceeding, each has been engaged in business as a drywall contractor in the building and construction industry, and thus "in an industry affecting (interstate) commerce" within the meaning of Section 8(b)(4) of the Act.[5]

Two of the incidents upon which the General Counsel bases his allegations of unlawful conduct occurred during the latter part of December 1962 at a construction project known as Springdale South Homes, where employees of Avalon, under the supervision of its "dry-

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[5]I take official notice that "the building and construction industry causes the flow of large quantities of goods" in interstate commerce. *Sheet Mental Workers Int'l. Assoc., Local 299*, 131 NLRB 1196 1198-1200. Thus Avalon and Reuben Casey are engaged in an "industry affecting commerce" within the meaning of Section 8(b)(4). *Sheet Metal Workers Int'l. Assoc., Local 229, supra, N.L.R.B. v. Plumbers Union*, 229 F 2d 497 (C.A. 2); *N.L.R.B. v. Operating Engineers*, 53 LRRM 2294 (C.A. 8).

wall foreman" at the site, Kenneth L. Coslett, were then working. The first incident at the project took place about December 20, 1962, when a business agent of Local 1232 named "Johnie" Thomas appeared at the construction site while products supplied by Hamilton to Avalon for use by the latter were being unloaded from a truck. Thomas introduced himself to Coslett as a representative of Local 1232, and told Coslett that Avalon "wouldn't be able to unload the material . . . that it was unfair material, and (that) if we (Avalon) did unload the material . . . and used it . . . they (Local 1232) would put up a picket line and we wouldn't be able to enter the job."[6] The materials were nevertheless unloaded and used in the project and no picketing took place.

Athough Local 1232 is not affiliated with the District Council, the latter undertook to assist Local 1232 in its dispute with Hamilton, and to that end two business representatives of the District Council, Calmer Hanson and William Seaquist, called at the Springdale project about two days after Thomas' visit there. Addressing Coslett and Avalon's project superintendent, Forrest Windell, Hanson said that the "material (obviously, in the context of events, a reference to Hamilton products) arriving on the job was unfair." Win-

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[6]Thomas was not called as a witness. Findings as to his remarks are based on Coslett's undisputed testimony. In its brief, Local 1232 claims, in effect, that the evidence does not establish that the materials came from Hamilton, and, in that respect, stresses an admission by Coslett at one point that he has no personal knowledge from whom they were purchased. To accept the contention would be as much as to place Thomas' visit to the site in a factual vaccum. The delivery of materials from Hamilton was the focus of his remarks to Coslett, and what led him to speak to the foreman. The evidence amply warrants an inference that the truck came from Hamilton and carried materials produced by that concern.

dell inquired whether the District Council was going to picket the project, and Hanson replied that he did not know. With that Hanson and Seaquist left the site.[7]

On or about December 20, 1962, Hanson was at the center of another incident involving the use of Hamilton products at a construction project. On the occasion in question, he followed a Hamilton truck to a construction site known as Weatherstone North, where employees of Reuben Casey were then working. The truck delivered materials supplied by Hamilton to Casey for use at the site. Arriving before the products were unloaded, Hanson spoke to Casey's "taping foreman," R. C. Wooten, in the presence of a Casey employee and the truck driver. As both Hanson and Wooten testified, in substance, the former told Wooten that the materials were "unfair," but the two witnesses

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[7]Findings as to what took place on the occasion of the visit of Hanson and Seaquist to the project are based on Hanson's testimony. Coslett gave more than one version of what was said. His initial one, prefaced by the reservation that he did not hear enough of the conversation "to recall it," is not materially different from Hanson's for he testified that "something (was) said about a picket line and Mr Hanson, Ibelieve . . . said that he didn't know whether there would be a picket line put up or not." Subsequently, after being shown a sworn statement he had given a representative of the General Counsel, and stating that his recollection was refreshed by the affidavit, he quoted Hanson as saying that "until the material was removed off the job . . . if they did put up a picket, . . . it (sic) would be there until the material was removed from the job." Although I believe Coslett was endeavoring to give his best recollection, he appeared to me to have an uncertain memory of the incident, as he in fact stated. Moreover, there is reason to believe that his attention was diverted from Hanson's remarks, for he testified that "I was talking Seaquist . . . and . . . didn't catch all of the conversation between Mr. Hanson and Wendell." Hanson's recollection of what took place appeared to me to be firmer than that of Coslett, and I have made corresponding findings.

are not in accord as to whether anything was said about picketing.

According to Wooten, after Hanson told him that Hamilton products were "unfair," he asked the District Council representative "what the consequences would be" if he accepted the materials, and Hanson replied that he "could put up a picket on the job." Hanson's version is that after he told Wooten that the materials were "unfair," Wooten asked what he was to do with them; that he (Hanson) replied that he "did not know"; and that Wooten then instructed the driver to put the truck in a garage at the site, stating that "they would unload it and hold it until such time as they had a clearance on this thing." There is no dispute that after this conversation, Hanson, as he testified, and as I find, sought out the project superintendent and told the latter that "the material arriving on the job was unfair" and was being unloaded; that the superintendent said he "would check into it"; and that that was all that passed between Hanson and the superintendent.

A number of facts lead me to believe that Hanson's version, rather than Wooten's, is of preponderant weight. For one thing, the record presents no reason why Hanson should tell Wooten that he "could put up a picket" at the Weatherstone project, but follow the contrasting course of telling Windell, in response to the latter's inquiry, that he had no knowledge whether the Springdale site would be picketed. It seems reasonable to believe, in other words, that if Wooten had made an inquiry as to the consequences of accepting the materials — an inquiry much the same as Windell's —

Hanson would have disclaimed any knowledge, as at the Springdale project. Moreover, bearing in mind that Wooten is a member of a local union affiliated with the District Council, I think it plausible that he would ask the organization's business agent, as the latter testified, what should be done with the materials; and that Hanson, having already stigmatized the products as "unfair" would let the matter rest there by adopting the non-committal attitude, in reply to the inquiry, that he, in effect, describes. For another matter, it is noteworthy that Hanson said nothing about picketing to the project superintendent, who, as one may plainly infer, had the power to accept or reject the products. Of course, it is not beyond possibility that Hanson would voice a picketing threat to Wooten, and not to the superintendent, but it is reasonable to believe that if Hanson were disposed to tell anybody at the project that it "could" be picketed, he would make the point with one in a position of authority to reject the materials. The fact that he did not mention the possibility of picketing to the superintendent enhances the plausibility of his account of his talk with Wooten. That is not to say that I have concluded that Wooten is wilfully misquoting Hanson, for it is conceivable that Wooten is sensitive to the possibility that a union's characterization of materials as "unfair" may be a prelude to picketing of a site where the products are used, and therefore has read into Hanson's remarks more than was literally there. Be that as it may, for the reasons stated, it appears to me, at the least, that Wooten's version, upon which the General Counsel relies to establish coercive conduct by the District Council at Weatherstone, is insufficient to carry the General Counsel's burden of proving his claim

by evidence of preponderant weight; but, going beyond that, as the scales of probability are, in my judgment, tipped by Hanson's account, I credit it.[8]

The fourth incident upon which the General Counsel relies involved Thomas and occurred in January 1963 at a construction project known as Sunkist Ranchos, where Avalon personnel were then working. On that occasion, as at the Springdale site, Thomas appeared at the project soon after a truck bearing materials from Hamilton for delivery to Avalon for use at the site arrived. The truck driver discussed the unloading of the materials with an Avalon foreman named Giambra, and while they were so engaged, Thomas came up to Giambra, gave the latter copies of two circulars which will be described in some detail at a subsequent point), and told the foreman that if the driver "unload the truck . . . he (Thomas) would picket the place." Giambra replied that he "didn't know anything about that."

The driver proceeded to unload the truck, and while he was so engaged, Thomas proceeded to a location on a street about a block from the unloading site and engaged in picketing. Upon completion of the unloading task, the truck driver drove off, and Thomas discontinued the picketing and followed the truck in his car.[9]

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[8]I note, also, that I see no reason to disbelieve testimony by the executive secretary of the District Council to the effect that its business agents were expressly instructed not to threaten secondary employers with picketing if they used Hamilton products. The fact that the testimony is self-serving and not readily susceptible to refutation does not automatically nullify it. But be that as it may, Hanson's account of his talk with Wooten appears to me to be credible without regard to the executive secretary's testimony.

[9]Findings as to the events of the Sunkist Ranchos project are based on Giambra's undisputed testimony.

B. *Concluding findings*

With respect to the conduct of the District Council, the material sum of the credited evidence is that its agent, Hanson, told supervisory personnel in the employ of secondary employers that Hamilton products were "unfair," and, in reply to a question by one such supervisor whether the project involved would be picketed, stated that he did not know.

Under long established doctrine, the characterizations of Hamilton products as "unfair" were not *per se* violative of Section 8(b)(4), for statements of that nature, although made to individuals in the employ of a secondary employer, are regarded as "direct thrusts" at the employer directly involved in the labor dispute, rather than inducement or encouragement of such individuals to engage in a strike or a refusal to handle or otherwise use such primary employer's products.[10] Nor do I see an implied threat in Hanson's remark to Windell that he did not know whether the Springdale project would be picketed. The subject of picketing was raised by Windell, and not by Hanson. It is evident that Hanson's authority is limited, and there is no evidence that he is authorized to decide which projects to picket, nor any indication that he had any knowledge of a plan to picket the Springdale site. Thus one may reasonably construe his remark as no more than a truthful disclaimer of knowledge in reply to Windell's question seeking information as to the consequence of using Hamil-

[10] *Denver Building and Construction Trades Council (The Grauman Co.)*, 87 NLRB 755, 756-7; *Spokane Building and Construction Trades Council (Kimsey Mfg. Co.)*, 89 NLRB 1168, 1169. So far as the point in question is concerned, the holding of these cases has not been affected by the Landrum-Griffin amendments of Section 8(b)(4).

ton products. In other words, the evidence does not support a finding that the reply constituted a threat, coercion or restraint within the reach of Section 8(b)(4)-(ii)(B) of the Act.

The sum of the matter is, as regards the District Council, that the record does not establish that it committed the unfair labor practices imputed to it, and, accordingly, I shall recommend dismissal of so much of the complaint as pertains to the organization.

Turning to conclusions concerning Local 1232, Thomas' conduct at the Springdale project requires little discussion. His statement to Coslett that if Avalon unloaded and used the materials, Local 1232 would "put up a picket line," with the result that Avalon personnel "wouldn't be able to enter the job," was a bald threat obviously designed to bring economic pressure to bear upon Avalon and individuals in its employ as a means of aiding Local 1232 in its dispute with Hamilton. The fact that the materials were unloaded and used and that the threatened picketing did not occur is immaterial. It is enough that Thomas, as I find he did, encouraged Coslett to refuse, in the course of his employment, to use, handle, or otherwise perform services with Hamilton products, and threatened, restrained and coerced Avalon, with the object of forcing or requiring Avalon to cease using, handling, or otherwise dealing in products of Hamilton, and to cease doing business with that concern. In short, as a result of Thomas' conduct at the Springdale project, Local 1232 violated Section 8(b)(4)(i) and (ii)(B) of the Act.[11]

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[11]Local 1232 makes no claim that Coslett's supervisory duties are such as to put him beyond the reach of the phrase "any individual employed by any person" as used in Section 8(b)(4)(i) of the Act. In any case, I find that he is an "individual" as that term is used in the section.

However, I reach a different result with respect to Thomas' conduct some weeks later at the Sunkist Ranchos project. Although he told Avalon's Foreman Giambra that he "would picket the place" if the driver "unloaded the truck," a close examination of the incident and its surrounding circumstances leads me to conclude that the threat was one to picket activities of Hamilton at the site rather than those of any secondary employer. I am led to that conclusion not merely by the fact that Thomas sought to prevent *Hamilton's driver* from unloading the truck, but by the circulars which Thomas gave Giambra, and by Thomas' subsequent conduct.

Both circulars contain a claim that Hamilton has refused to bargain with Local 1232 as the certified representative of Hamilton employees; and, in addition, one states, in substane, that the union's "picketing activities at this job site" are intended solely to secure the cooperation of Hamilton employees, and that picketing would take place only when such employees were at the site; and the other, in effect, that the purpose of picketing "at this job site" is to publicize the facts of the controversy, and that the union's dispute is only with Hamilton. It would be error, in my judgment, not to treat the circulars as part of Thomas' communication to Giambra. So considered, they have the effect of informing Giambra that what Thomas meant by his remark that he "would picket the place" was that he would picket Hamilton's driver while he unloaded the truck. Moreover, such a meaning is underscored by the fact that the picketing that took place coincided with the unloading of the truck by the driver and ceased as soon as he left the premises. To be sure, the picketing

is but scantily described in the record; we are not informed of the contents of any picketing sign, nor are we told the reason why Thomas picketed about a block from the unloading site; but such description as there is would reasonably lead one to believe that the driver was the target of the picketing. The record will not support a finding that Local 1232 violated Section 8(b)(4) of the Act at the Sunkist Ranchos project.

IV. The effect of the unfair labor practices upon commerce

The activities of Local 1232 at the Springdale South Homes project, set forth in Section III, above, occurring in connection with the operations of Avalon and Hamilton, described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states and to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.[12]

V. The remedy

Having found that Local 1232 has engaged in unfair labor practices violative of Section 8(b)(4)(B) of the Act, I shall recommend below that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

As the record does not establish that the District Council committed the unfair labor practices imputed

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[12]I do not agree with a contention by Local 1232 in its brief to the effect that Thomas' conduct at Springdale should be treated as *de minimus*. To accept the claim would have the practical effect of limiting the reach of Section 8(b)(4)(ii)(B) to multiple acts of coercion, and to that extent of thwarting the Congressional objective of immunizing secondary employers from the pressures condemned by the section.

to it, I shall recommend dismissal of so much of the complaint as applies to it.

VI. Conclusions of law

Upon the basis of the foregoing findings of fact, and upon the entire record in this proceeding, I make the following conclusions of law:

1. Avalon Painting & Drywall Co., Reuben Casey, and Hamilton Materials, Inc. respectively are, and have been at all material times, employers within the meaning of Section 2(2) of the Act, and persons within the meaning of Section 2(1) of the Act; and respectively are, and have been at all material times, engaged in commerce or in an industry affecting commerce within the meaning of Sections 2(6) and 2(7) of the Act.

2. District Council of Painters #48 and Paint Makers Local Union #1232 respectively are, and have been at all material times, labor organizations within the meaning of Section 2(5) of the Act.

3. By encouraging an individual employed by Avalon to refuse, in the course of his employment, to use, handle, or otherwise perform services with Hamilton materials, with an object of forcing or requiring Avalon to cease using, handling, or otherwise dealing in any products of, and to cease doing business with, Hamilton, as found above, Local 1232 has engaged in unfair labor practices within the meaning of Section 8(b)(4)(i)(B) of the Act.

4. By threatening, restraining and coercing Avalon for such an object, as found above, the said Local 1232 has engaged in unfair labor practices within the meaning of Section 8(b)(4)(ii)(B) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Sections 2(6) and 2(7) of the Act.

6. The record does not establish that the District Council has engaged in unfair labor practices.

VII. Recommended Order

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this proceeding, I recommend that Paint Makers Local Union #1232, its officers, representatives, successors, assigns and agents shall:

1. Cease and desist from:

(a) Engaging in, or inducing or encouraging any individual employed by Avalon Painting & Drywall Co. to engage in, a strike or a refusal in the course of such individual's employment to use or handle any materials, or to perform any services, with an object of forcing or requiring Avalon Painting & Drywall Co. to cease using, handling or otherwise dealing in any products of, or to cease doing business with, Hamilton Materials, Inc.;

(b) Threatening, coercing or restraining Avalon Painting & Drywall Co. for such an object.

2. Take the following affirmative action which, I find, will effectuate the policies of the Act:

(a) Post in conspicuous places at its headquarters and usual membership meeting place, including all places where notices to its members are customarily posted, copies of the notice attached hereto and marked Appendix A. Copies of said notice to be furnished by the Regional Director for the Twenty-first Region of the

National Labor Relations Board, shall, after being signed by a duly authorized representative of the said Local 1232, be posted by it immediately upon receipt thereof and maintained by it for 60 days thereafter in such conspicuous places. Reasonable steps shall be taken by the said Local 1232 to insure that said notices are not altered, defaced, or covered by any other material;[13]

(b) Forthwith mail copies of the said notice to the said Regional Director at the Regional Office of the National Labor Relations Board in Los Angeles, California, after such copies have been signed as provided above, for posting by Avalon Painting & Drywall Co., if it so agrees, at places where it customarily posts notices to individuals in its employ;

(c) Notify the said Regional Director for the Twenty-first Region of the National Labor Relations Board, in writing, within 20 days from the date of the receipt of this Intermediate Report and Recommended Order what steps Local 1232 has taken to comply herewith.[14]

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[13]In the event that these recommendations are adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. In the additional event that the Board's Order is enforced by a decree of the United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

[14]In the event that these recommendations are adopted by the Board, paragraph 2(c) thereof shall be modified to read: "Notify the said Regional Director, in writing, within 10 days from the date of this Order what steps the Respondent, Paint Makers Local Union #1232, has taken to comply therewith.

* * *

It is also recommended that, unless on or before 20 days from the date of receipt of this Intermediate Report and Recommended Order, the Respondent, Paint Makers Local Union #1232, notify the said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the said Respondent to take the action aforesaid.

It is further recommended that so much of the complaint be dismissed as applies to District Council of Painters #48.

Dated:

/s/ Herman Marx
Trial Examiner

APPENDIX A

Notice to All Members of Paint Makers Local Union #1232 and Individuals Employed by Avalon Painting & Drywall Co.

Pursuant to
The Recommendations of a Trial Examiner

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our members and the said employees that:

WE WILL NOT engage in, or induce or encourage any individual employed by AVALON PAINTING & DRYWALL CO. to engage in, a strike or refusal in the course of such individual's employment to use or handle any materials, or to perform any services, with an object of forcing or requiring AVALON PAINTING & DRYWALL CO. to cease using, handling, or otherwise dealing in any products of, or to cease doing business with, HAMILTON MATERIALS, INC.; or to threaten, coerce or restrain AVALON PAINTING & DRYWALL CO. for such an object.

Paint Makers Local Union #1232
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date of such posting and must not be altered, defaced, or covered by any other material.

Information regarding provisions of this notice and compliance with its terms may be secured from the Regional Office of the National Labor Relations Board, 849 So. Broadway, Los Angeles 14, California. (Telephone No: RIchmond 9-4711, Extension 1031.)